

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION**

WALTER NELOMS, *
Plaintiff, *
v. * CASE NO. 4:07-CV-77 (CDL)
42 U.S.C. § 1983
NURSE BYRD and BROWN KEYES, *
Defendants. *

REPORT AND RECOMMENDATION

Before the court is Defendants' Motion to Dismiss, filed on January 2, 2008. In their Motion, Defendants move the court to dismiss Plaintiff's action for his failure to comply with Federal Rule of Civil Procedure 37 which reads, in relevant part, that:

If a party . . . fails . . . to appear before the officer who is to take the deposition, after being served with proper notice . . . , the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraph (A)(B), and (C) of subdivision (b)(2) of this rule.

F.R.C.P. 37 (d). Plaintiff was notified of his right to respond and filed said response on January 18, 2007.

The record reveals that on July 24, 2007, a deposition was scheduled in this matter. At the date and time in question, Defendants' attorney began to question Plaintiff who refused to answer any questions. (R-21). On August 1, 2007, Defendants filed a Motion to Dismiss for the Plaintiff's failure to appear at the scheduled deposition. On August 8, 2007, Plaintiff filed a Motion for Appointment of Counsel wherein the court denied Plaintiff's

request and ordered Plaintiff to comply with discovery and notified him that failure to comply would result in a dismissal of his action. (R-13).

On August 16, 2007, Defendants' served Plaintiff with notice of a second deposition to be held on August 28, 2007. On August 22, 2007, Plaintiff filed a Motion For Denial of Discovery. (R-15). In his Motion, Plaintiff moved the Court to grant him the right to refuse to submit to a second deposition by the Defendants. Plaintiff was informed that no such right existed within the Federal Rules of Civil Procedure and that he must comply with Defendants' discovery requests or face dismissal of the action. (R-16). At the second deposition held on August 28, 2007, Plaintiff again refused to answer questions. (R-21). Thereafter, on October 10, 2007, a third deposition was attempted, and, again, Plaintiff refused to answer questions posed by Defendants' attorney.

WHEREFORE, having been repeatedly ordered to comply with Defendants' discovery requests, warned of the consequences, and repeatedly failing to comply, it is RECOMMENDED that the above-styled case be dismissed pursuant to Federal Rule of Civil Procedure 37, which authorizes the court to dismiss "the action or proceedings or any part thereof . . ." for Plaintiff's failure to "appear" at his depositions. F.R.C.P. 37(b)(2).

Pursuant to 28 U.S.C. § 636(b)(1), Plaintiff may serve and file written objections to this recommendation with the United States District Judge, WITHIN TEN (10) DAYS after being served with a copy hereof.

SO ORDERED this 23rd day of January, 2008.

eSw

S/G. MALLON FAIRCLOTH
UNITED STATES MAGISTRATE JUDGE